Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Request for Review by InterCall, Inc. of Decision of Universal Service Administrator	CC Docket No. 96-45

REPLY COMMENTS IN SUPPORT OF PETITION FOR RECONSIDERATION BY A+ CONFERENCING, LTD., FREE CONFERENCING CORPORATION, AND THE CONFERENCE GROUP

Ross A. Buntrock
Stephanie A. Joyce
Jennifer M. Kashatus
WOMBLE CARLYLE SANDRIDGE & RICE, PLLC
1401 Eye Street, NW, Seventh Floor
Washington, D.C. 20005
Tel: 202.857.4479

Counsel for Petitioners A+ Conferencing, Ltd., Free Conferencing Corporation, and The Conference Group

Dated: September 22, 2008

SUMMARY

Commenters agree with these Petitioners that the *InterCall Order* created new law without the notice required by the Administrative Procedure Act ("APA"). In finding that conference bridges are telecommunications providers, despite its prior precedent and the abundant record evidence to the contrary, the Commission imposed, for the first time, Universal Service Fund ("USF") obligations on an entire industry that was "caught off guard," as Multi-Point Communications stated in its supporting comments. The VON Coalition and Cisco agree that the *InterCall Order* changed federal law in a surprising fashion. Because, as Petitioners demonstrated, federal agencies are not permitted to "upend," as VON puts it, their regulations without clear notice, the *InterCall Order* is the product of fatally insufficient procedure and is reversible on that ground alone.

The record also demonstrates that the Commission's substantive conclusions in the *InterCall Order* are errors of both fact and law. First, the Commission erred by ignoring record evidence that conference bridges are not switches and that they fully integrate enhanced functionalities with telecommunications, particularly as there was and is no record evidence to the contrary. Secondly, the Commission contravened its long-standing precedent regarding information-telecommunications integration — the *Prepaid Calling Card Order* — under which there can be no other reasonable conclusion than that conference bridges should be deemed and treated as information services. These errors of fact and law warrant reconsideration under the well-settled standards and practice developed under Commission Rule 1.106, 47 C.F.R. § 1.106.

Finally, these Petitioners oppose the position InterCall has taken in its responsive comments advocating that the Commission invoke its section 254(d), 47 U.S.C. § 254(d), permissive authority to justify imposing USF obligations on conference bridge providers.

Though the Commission previously has relied on section 254(d) to expand the base of USF contributors, in each instance it nonetheless found that the affected entities provide telecommunications as section 254(d) requires. Here, by contrast, it has been demonstrated that conference bridge providers are not telecommunications providers, and thus to invoke permissive authority here would be a drastic and impermissible expansion of the USF regime.

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A+ Conferencing, Ltd., Free Conferencing Corporation, and The Conference Group (the "Petitioners"), by their attorneys and pursuant to 47 C.F.R. §§ 1.106 and 1.429, file these Reply Comments in support of their Petition for Reconsideration ("Petition") of Order FCC 08-160 released on June 30, 2008, in this docket (the "*InterCall Order*"). Commenters agree that the *InterCall Order* has created new law governing Universal Service Fund ("USF") contributions, and that both its procedural basis and rationale are deeply flawed. The Commission therefore should, in accordance with settled administrative precedent, reconsider (and not merely "clarify") its decision that integrated toll conference and audio bridge providers should be deemed "telecommunications carriers" for purposes of USF.

RESPONSE AS TO STANDARD OF REVIEW

The Petition quotes the applicable standard of review for reconsideration: "'where the petitioner shows either a material error or omission in the original order,'"[1] or "'if the reconsideration is in the public interest.'"[2] In opposing the Petition, Verizon forgets half of this standard, stating only that "Petitioners raise no new questions of law or fact to warrant reconsideration."[3] Verizon thus ignores settled law stating that reconsideration is appropriate to remedy an error of law — in this case, the Commission's "misinterpreting and ignoring [of] precedent demonstrating that audio bridging providers offer a fully integrated *information*

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1 Petition at 2 (quoting *In re Applications of D.W.S., Inc.*, File Nos. BR-890720UD *et al.*, Memorandum Opinion and Order, 11 FCC Rcd. 2933 (1996)); *see also id.* (citing *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations*, Memorandum Opinion and Order, 10 FCC Rcd. 7727 (1995) ("error of fact or law")).

2 Petition at 2 (quoting *Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*, WT Docket No. 97-82, Second Order on Reconsideration of the Third Report and Order, 18 FCC Rcd. 10180, 10212 ¶ 48 (2003)).

3 Opposition of Verizon to Reconsideration at 1 ("Verizon Opp.").

services product."[4] Moreover, Petitioners have demonstrated that the Commission "ignored record evidence demonstrating that a conference bridge in fact does not route any traffic."[5] The Petition therefore fully satisfies settled FCC precedent for granting reconsideration, and the *InterCall Order* should be reversed.

ARGUMENT

I. THE RECORD DEMONSTRATES THAT THE COMMISSION IN FACT CREATED A NEW RULE AND THAT APPROPRIATE NOTICE WAS NOT ISSUED TO THE CONFERENCE BRIDGE INDUSTRY

Petitioners' demonstration that the *InterCall Order* impermissibly adopted a legislative rule without sufficient notice drew broad support in the record.[6] The majority of commenters recognize, such as the VON Coalition who "echoes" Petitioners' concerns, that the *InterCall Order* created new law.[7] Yet in order to create new rules in compliance with Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553(b), the Commission should have given "'sufficient notice ... that affords interested parties a reasonable opportunity to participate in the rulemaking process.'"[8] As the comments of Multi-Point Communications, a small business providing "unified communications," make clear, however, the conference bridge industry was "caught off guard that such a rule was forthcoming."[9]

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4 Petition at 11 (emphasis in original).

5 *Id.* at 9.

6 *Id.* at 3-7.

7 Comments of the Voice on the Net Coalition at 1, 5 ("VON Comments") ("VON echoes the concerns raised by the Reconsideration Petition"); Comments of Multi-Point Communications, LLC at 3 ("Multi-Point Comments"); Comments of Cisco Systems, Inc. at 1 ("Cisco Comments").

8 Petition at 4 (citing *Forester v. Cons. Prod. Safety Comm'n*, 559 F.2d 774, 787 (D.C. Cir. 1977)).

9 Multi-Point Comments at 2.

As an initial matter, because Verizon raised it, though cursorily,[10] Petitioners note that their standing in this matter is unassailable and the Petition is procedurally proper. Petitioners are providers of audio bridging and conferencing services, and they purportedly now must contribute a portion of their revenue to USF. By any standard, Petitioners' "interests are adversely affected" by the *InterCall Order*, and they have the right to seek reconsideration.[11] The fact that Petitioners did not file comments — a fact that itself illustrates the insufficiency of the Public Notice — does not bar them from seeking review of the order at this time. Verizon provides no authority to the contrary.[12]

With regard to Petitioners' procedural challenge, the audio bridge and conferencing industry was "caught off guard" by the conclusion in the *InterCall Order*, because the public filings in the InterCall adjudication "gave no indication that the resulting order would bind any other providers besides InterCall."[13] Others in the industry have expressed confusion, or at the least concern, that in fact the *InterCall Order* appears to "upend precedent" that delineates information services from telecommunications, and "changed the standard for what constitutes an integrated information service."[14] In addition, Cisco is concerned, as a vendor to these information service providers, that "the *InterCall Order* quietly but fundamentally alters the Commission's approach to information services that include telecommunications components."[15] Thus, contrary to Verizon's assertion, Petitioners are not "misguided" in arguing

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10 Verizon Opp. at 1.

11 47 C.F.R. § 1.106(b)(1).

12 *See* Verizon Opp. at 1.

13 Multi-Point Comments at 2.

14 VON Comments at 5, 1.

15 Cisco Comments at 1.

that the *InterCall Order* lacked sufficient notice,[16] because several segments of this industry were similarly surprised that InterCall's tiny inquiry to USAC spawned a fundamentally new standard for USF contribution.

Federal agencies endowed with rulemaking authority must "adhere to 'the degree of openness, explanation, and participatory democracy required by the APA[.]'"[17] The record in this case demonstrates that the *InterCall Order* entailed, by contrast, only "last-minute notice" to the conferencing industry of the intended scope of USAC's decision.[18] And rather than openness and explanation, the terse Public Notice announcing InterCall's appeal of USAC's decision stated only that "InterCall's audio bridging services are toll teleconferencing services, requiring InterCall to submit FCC Form 499 filings to USAC."[19] An entire industry cannot reasonably be expected to discern from this language that not only InterCall's service, but *all* teleconferencing services, were potentially affected by the proceeding. The surprise and confusion expressed by commenters, and the fact that Petitioners now must seek reconsideration, evidence the deficiency of the Public Notice in this case.

As to the fatal procedural deficiencies underlying the *InterCall Order*, Verizon understates the weight of authority in Petitioners' favor. Asserting that Petitioners "cite[] only one case — *Forester v. Consumer Product Safety Commission*, 559 F.2d 774 (D.C. Cir. 1997),"[20] a statement that ignores Petitioners' reliance on the instructions of *Weyerhaeuser*,

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16 Verizon Opp. at 11.

17 Petition at 4 (quoting *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (9th Cir. 1978)).

18 Multi-Point Comments at 2-3.

19 Public Notice, DA 08-371, *Comment Sought on InterCall, Inc.'s Request for Review of a Decision by the Universal Service Administrative Company and Petition for Stay* (rel. Feb. 14, 2008); *see also* Petition at 6 (quoting same).

20 Verizon Opp. at 10.

Verizon attacks this authority as being "inapposite." Yet Petitioners expressly rely on *Forester* to "[c]ompare the posture of the rulemaking" in that case with the FCC's handling of the *InterCall* matter in order to demonstrate why the Public Notice was deficient under 5 U.S.C. § 553(b).[21] Petitioners never purported that *Forester* resulted in reversal of the Commission.

In *Forester*, to reiterate, the Consumer Product Safety Commission ("CPSC") defended its promulgation of bicycle labeling rules implementing the Federal Hazardous Substances Act, 15 U.S.C. §§ 1261-74. The CPSC initially intended to include only children's bicycles in the rule, but after several rounds of comments issued a rule covering all bicycles sold in the United States. The petitioner argued that the CPSC had not given sufficient notice that the rule's scope would be broadened in this way, and the D.C. Circuit rejected that argument on the ground that several public notices in that proceeding "'indicated that the proposed regulations applied to 'Bicycles'" without limitation.[22] Thus, *Forester* plainly stands for the proposition that an agency may broaden the scope of a proposed ruling — such as broadening a USF adjudication of one conference bridge provider to include the entire conferencing industry — only if the agency makes clear what will be the scope of the forthcoming decision. *Forester*'s application to this case is unmistakable, and the D.C. Circuit's reasoning demonstrates that the FCC failed to adhere to APA notice requirements in this proceeding.

It is remarkable that Verizon baselessly criticizes Petitioners' reference to *Forester* for a comparative example of proper notice, and yet Verizon's own authority is entirely misapplied. Verizon first offers *Goodman v. FCC*, 182 F.3d 987 (D.C. Cir. 1999), a case that regards only the question of which deadline for appeal applies to FCC decisions on licensing

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21 Petition at 6.

22 *Id.* (quoting 559 F.2d at 788).

requirements.[23] There, several petitions for review were dismissed as untimely, because they were filed more than 60 days after an order's publication as defined by Commission Rule 1.4(b), 47 C.F.R. § 1.4(b).[24] That definition turns on whether the decision was made in a "rulemaking" or a "non-rulemaking,"[25] which as Petitioners made clear is not the relevant inquiry in this reconsideration.[26] The Petition here regards insufficiency of notice, regardless of the label given to the underlying proceeding. *Goodman* thus is neither controlling nor instructive precedent in this reconsideration.

To the extent that *Goodman* has any bearing on the question of the rights of non-parties in a rulemaking, its facts are exactly the opposite of the facts in this case. There, non-participating third parties were given a benefit — an extension of time to construct transmission facilities. Though perhaps some non-parties had no notice of that benefit, it is difficult to find any harm those parties could have suffered. Moreover, the benefit conferred in *Goodman* regarded licensing rights that, as a well-settled matter of communications law, are not indefeasible property.[27] Here, in sharp contrast, an entire industry is being subjected to USF

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23 Verizon Opp. at 11-12.

24 182 F.3d at 993.

25 *Id.* at 993-94.

26 Petitioners stated that they

> do not assert that the Commission's promulgation of a legislative rule from within an adjudication was unlawful or improper. Federal agencies of course retain the authority and discretion to adopt rules via the procedural vehicle best suited to the purpose. *E.g.*, *Securities and Exch. Comm'n v. Chenery*, 332 U.S. 194, 201 (1947). The Commission's error here was in failing to issue sufficient public notice that the result of the Request for Review would result in an industry-wide USF rule.

Petition at 5 n.22.

27 *See Goodman*, 182 F.3d at 990; *see also Applications of Kirk Merkely, Receiver*, 94 F.C.C.2d 829 (1983), *recon. denied*, 56 R.R.2d 413 (1984), *aff'd sub nom. Merkely v. FCC*, 776

contribution requirements — mandatory remittance of service revenue — which plainly impacts their protected property rights and deserves appropriate notice.[28]

Verizon's other authority is similarly misplaced. The holding of *Kidd Communications v. FCC*, 427 F.3d 1 (D.C. Cir. 2005) (Verizon Opp. at 12 n.14) is that the FCC cannot ignore a rationale that it articulated within an adjudication. In *Kidd*, the D.C. Circuit vacated an FCC order that permitted an involuntary transfer of a broadcast license by a trustee, finding that the FCC was bound to adhere to its previous decisions, wherever articulated, that broadcast licenses are not fully fungible assets.[29] The *Kidd* case did not involve the expansion of an adjudication into a legislative rule without notice; the petitioner in *Kidd* was given all applicable due process for his challenge to the transfer. Rather, *Kidd* simply requires the FCC to comport with its own precedent — another requirement that, as demonstrated in the Petition and in Section II below, the Commission failed to satisfy here with regard to the classification of integrated services. As with *Goodman*, Verizon's reliance on *Kidd* does not persuade that notice in this proceeding was sufficient, and in fact weighs in favor of Petitioners' procedural challenge to the *InterCall Order*.

The new rule, or at the least new result, in the *InterCall Order* required the Commission to have issued clear notice of its intended industry-wide scope. Because none of the documents in this record, most notably the Public Notice, provide such notice, the *InterCall*

F.2d 365 (D.C. Cir. 1985) (Mem.) (broadcast license). "[A] Commission license is not an owned asset or property right." 56 R.R.2d at 516.

[28] *E.g.*, *CBS v. FCC*, 535 F.3d 167, 174-75 (D.C. Cir. 2008) (vacating indecency fine imposed "without supplying notice of and a reasoned explanation for" decision).

[29] *Kidd*, 427 F.3d at 5-6.

Order is the product of reversible error,[30] and should be reconsidered.

II. THE MAJORITY OF COMMENTERS AGREE THAT THE COMMISSION MUST RECONSIDER THE *INTERCALL ORDER*, BECAUSE IT COMMITTED MATERIAL ERRORS OF FACT AND LAW

The majority of commenters agree with Petitioners that the Commission committed material errors of fact and law, and, therefore, must reverse its finding in the *InterCall Order* that audio bridging providers are telecommunications providers who must contribute to USF.[31] The record in this proceeding demonstrates that audio bridging providers are not telecommunications providers, because: (1) a conference bridge does not route traffic or operate like a switch; and (2) the features and functions offered by audio bridging providers are integrated into an audio bridging provider's underlying service.[32] Not a single commenter, including Verizon, has presented any evidence to the contrary. The Commission therefore should reverse its conclusion that audio bridging providers are telecommunications providers and are subject to USF contribution obligations.

A. The Record Demonstrates That the Commission's Finding Regarding Conference Bridge Functionality Is a Material Error

Commenters in this proceeding agree that the Commission's findings regarding the nature and purpose of a conference bridge are erroneous. In the *InterCall Order*, the Commission concluded that InterCall's service constitutes telecommunications and that the "existence of a bridge that users dial into does not alter this classification."[33] In reaching this conclusion, the Commission found that "the purpose and function of the bridge is simply to

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30 Petition at 5 (citing *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008)).

31 *InterCall Order* ¶¶ 13 n.38, 19.

32 Petition at 9-10; InterCall Comments at 2-3; VON Coalition at 2.

33 *InterCall Order* ¶ 11.

facilitate the routing of ordinary telephone calls."[34] But the FCC reached this conclusion despite the presence of record evidence to the contrary.[35] Indeed, in the proceeding below, InterCall explained that its bridge neither switches nor routes communications from one caller to another, but rather bridges those callers together.[36] The Commission, however, ignored this key point, and instead reached the opposite conclusion, never even addressing InterCall's statement about the inability of audio bridges to route telephone calls.

Not a single commenter presented any evidence demonstrating that a conference bridge routes ordinary telephone calls. Indeed, neither of the commenters critical of the Petitions for Reconsideration even addressed this point.[37] Accordingly, because the Commission's findings of fact were erroneous, and not a single commenter has presented any evidence to the contrary, the Commission should reverse its decision and conclude that audio bridging providers are not telecommunications providers, and therefore are not required to contribute to USF.

B. The Record Demonstrates that the Commission Committed Material Errors of Fact and Law by Concluding that Audio Bridging Products Are Not Sufficiently Integrated So As To Constitute an Information Service

Commenters in this proceeding agree that the Commission erred in concluding that audio bridging products are not sufficiently integrated so as to constitute an information service. As an initial matter, the Commission's decision has the potential to discourage innovation. The Commission's decision in the *InterCall Order* essentially concludes, as the VON Coalition explains, that "enabling voice transmission over the PSTN can convert an

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34 *Id.*

35 Reply Comments of InterCall, Inc. at ii. (Mar. 3, 2008) (stating that audio bridging companies "do not route calls...").

36 *Id.* at 16.

37 Although Cisco opposes the Petitions for Reconsideration, throughout its comments it expresses concern that the Commission in fact rewrote its existing rules. *See* Cisco Comments at 2.

unregulated service into a regulated service."[38] This rationale, which permeates the *InterCall Order*, ignores the myriad functions and features of audio bridging services and misapplies or fails to consider applicable precedent.

The comments in this proceeding demonstrate that audio bridging products are functionally integrated. As InterCall explains, "the features...[are] available at all times and are designed to work seamlessly *with* the audio bridging service so that a user activating any of these features receives both the audio capacity and the feature simultaneously. The features, in other words, are integrated with the core conferencing elements and with the transmission link between the participant and the conference bridge itself."[39] No commenter has refuted this representation with any evidence demonstrating that the products are not sufficiently integrated.

Moreover, in reaching its conclusion, the Commission ignored existing precedent regarding functional integration. Specifically, as the Petitioners demonstrated,[40] the Commission erred in relying on the *Prepaid Calling Card Order* to support its conclusion that the features offered in conjunction with InterCall's service are not "'integrated' and thus do not change a service from telecommunications to an information service."[41] The functions and features inherent in an audio conferencing bridge are clearly distinguishable from the functions at issue in a prepaid calling card.

The only parties supporting the Commission's reliance on the *Prepaid Calling Card Order* — Verizon and Cisco — still have not provided any evidence demonstrating why that order supports the FCC's holding in this case. Instead, Verizon merely states, without

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38 VON Comments at 8.

39 InterCall Comments at 3.

40 Petition at 11-13.

41 *Id.* (citing *Regulation of Prepaid Calling Card Services,* Declaratory Ruling Report and Order, 21 FCC Rcd. 7290, 7295-96, ¶¶ 14-15 (2006) ("*Prepaid Calling Card Order*")).

providing any factual support, that the "mere addition of value-added features does not transform an underlying service from a toll teleconferencing service into something more."[42] Verizon fails to acknowledge, however, that audio bridging providers are not simply providing added features before or after a call is connected (as was the case in the *Prepaid Calling Card Order*), but instead are integrating those features as part and parcel of the call.[43] And Cisco simply claims, relying on the *Prepaid Calling Card Order*, that "the information service/telecommunications service determination 'may be difficult.'"[44] But neither Verizon nor Cisco has presented any evidence supporting the application of the *Prepaid Calling Card Order* to the specific facts of an audio bridging provider.

The Petitioners demonstrated that the Commission applied the incorrect integration standard when evaluating InterCall's audio bridging service.[45] As Cisco correctly explains, the "touchstone" for distinguishing between information and telecommunications services is the *Cable Modem Order*,[46] which the Commission conspicuously ignored. And Verizon has not presented any evidence in support of the Commission's application of the integration standard here.

In addition, the Commission failed to consider the fact-specific inquiry of the services that each audio bridging provider offers. The VON Coalition correctly explained that the Commission's analysis in the *InterCall Order* "changed the standard for what constitutes an

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42 Verizon Comments at 6.

43 *See* Petition at 11.

44 Cisco Comments at 4.

45 Petition at 13-16.

46 Cisco Comments at 2.

integrated information service, in the course of one company's USAC appeal."[47] Indeed, "[w]hether information and telecommunications services are functionally integrated is necessarily a product-specific, fact-based determination."[48] Petitioners agree with the VON Coalition that if the Commission does not reverse its finding in the *InterCall Order*, then it must clarify that it simply was evaluating the particular facts and circumstances of only InterCall and that its decision does not apply to other providers unless they provide exactly the same type of service. To make a sweeping ruling for all providers, particularly ones that vary substantially in their features and functionalities, clearly would be a violation of the Commission's existing rules and orders.

C. The Commission Should Not Extend USF to Audio Bridging Providers Under Its Permissive Authority in Section 254(d)

The Commission should reject InterCall's suggestion that the Commission may rely on its permissive authority in section 254(d) to extend universal service requirements to audio conferencing providers.[49] The Commission may apply USF requirements under the permissive authority in section 254(d) only to "providers of interstate telecommunications."[50] The Commission has used its permissive authority under section 254(d) to extend the USF to private service providers[51] and interconnected VoIP providers.[52] In both instances, however, the

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47 VON Comments at 1.

48 *Id.* at 4.

49 *See* InterCall Comments at 4.

50 47 U.S.C. § 254(d).

51 *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, 12 FCC Rcd. 8776 ¶ 276 (1997).

52 *See generally Universal Service Contribution Methodology*, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, FCC 06-94, 21 FCC Rcd. 7518 (2006).

Commission predicated doing so — as it is statutorily required to do — on a finding that the entities were providing telecommunications.

In the present case, as the Petitioners explained above, the Commission already has attempted to create a new rule by assigning USF obligations to audio and conference bridge providers. The Commission could seek to extend the USF to audio bridging providers under section 254(d) only after conducting a rulemaking proceeding. That rulemaking never took place. To now invoke section 254(d) as grounds to assess USF on audio bridging providers would simply compound the error of which Petitioner complain: there was no notice regarding the Commission's potential reliance on section 254(d).

InterCall has not provided any support for its position, and the Commission would need to seek comment on the implications thereof in order to make such a drastic finding. Accordingly, the Commission should reject InterCall's suggestion that the Commission "add conference service providers as direct contributors to USF under the permissive authority of Section 254(d)."[53]

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[53] InterCall Comments at 4.

CONCLUSION

For all these reasons, the Commission should grant this Petition and hold that audio and conference bridging services are not required to contribute directly to the Universal Service Fund.

Respectfully submitted,

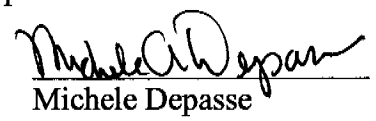
By: _____
Ross A. Buntrock
Stephanie A. Joyce
Jennifer M. Kashatus
WOMBLE CARLYLE SANDRIDGE & RICE, PLLC
1401 Eye Street, NW, Seventh Floor
Washington, D.C. 20005
Tel: 202.857.4479

Counsel for Petitioners A+ Conferencing, Ltd., Free Conferencing Corporation, and The Conference Group

Dated: September 22, 2008

CERTIFICATE OF SERVICE

I hereby certify that the foregoing InterCall Reply Comments in Support of Its Petition for Reconsideration was electronically filed on this 22nd day of September, 2008, and was served on the following persons via First Class Mail, postage prepaid:



Michele Depasse

Brad E. Mutschelknaus
Steven A. Augustino
Denise N. Smith
Kelley Drye & Warren LLP
3050 K Street, N.W., Suite 400
Washington, D.C. 20007
Counsel for InterCall, Inc.

Cathy Carpino
Gary Phillips
Paul K. Mancini
AT&T Inc.
1120 20th Street, N.W., Suite 1000
Washington, D.C. 20036

William E. Snow
Catherine N. Smith
Chiampou Travis Besaw & Kershner LLP
45 Bryant Woods North
Amherst, New York 14228
On Behalf of Canopco, Inc. (U.S.)

Scott Brian Clark
James A. Stenger
Thelen Reid Brown Raysman & Steiner, LLP
701 Eighth Street, N.W.
Washington, D.C. 20001
Counsel for Genesys SA

Charles A. Hudak
Charles V. Gerkin, Jr.
Friend, Hudak & Harris, LLP
Three Ravinia Drive
Suite 1450
Atlanta, GA 30346-2117
Counsel for Premiere Global Services, Inc.

Craig J. Brown
Tiffany West Smink
Qwest Communications International, Inc.
Suite 950
607 14th Street, N.W.
Washington, D.C. 20005

Elliot M. Gold
President
TeleSpan Publishing Corporation
50 West Palm Street
Altadena, California 91001-4337

Mark J. O'Connor
Helen E. Disenhaus
Lampert, O'Connor & Johnston, P.C.
1776 K Street, N.W., Suite 700
Washington, D.C. 20006
Counsel for Global Conference Partners

Kenneth C. Johnson
Bennet & Bennet, PLLC
4350 East West Highway
Suite 201
Bethesda, MD 20814
Counsel for Multi-Point Communications, LLC

Jim Kohlenberger
The VON Coalition
5411 Alta Vista Road
Bethesda, MD 20814
Counsel for The VON Coalition

Scott Blake Harris
Brita Dagmar Strandberg
Linda Coffin
Harris, Wiltshire & Grannis
1200 – 18th Street, N.W.
Washington, D.C. 20036
Counsel for Cisco Systems, Inc.

Karen Zacharia
Christopher M. Miller
Verizon
1515 North Courthouse Road
Suite 500
Arlington, VA 22201-2909